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Supreme Court, U.S.
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No.: 95-517

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOSE M. TOURON,

Petitioner,

vs.

METROPOLITAN DADE COUNTY, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents' claims that Petitioner has misrepresented facts to the Court are spurious; it is a bold-faced attempt to cloud the issues.

Respondents claim that the arbitrator was not an arbitrator but a "hearing examiner." This is a question of semantics. In fact, the hearing examiner refers to himself as an "arbitrator" (See App. 34, Petition for Writ of Certiorari). Be that as it may, the role of the hearing examiner was the same, his title is of no consequence; the County will be appeased, and the arbitrator shall be referred to as a hearing examiner. The hearing examiner's actions were not, in any event, final and binding, and were limited in scope of review; he could not hear a violation of civil rights because he lacked subject matter jurisdiction. As a point of fact, Petitioner sought review of the hearing examiner's report and recommendation, and the County Manager's decision, only upon order of the Court. See Petitioner's Appendix to Petition for Writ of Certiorari, App. 58-61.

Assuming arguendo, that the County Manager's decision was the decision reviewed by the Eleventh Judicial Circuit, res judicata still does not apply to bar Petitioner's claims. In Allen v. McCurry, 449

U.S. 90, 101 S.Ct. 441 (1980), this Court pointed out that a decision rendered by a court may preclude relitigation of the issue in a suit on a different cause of action. But those issues of fact or law reviewed must be necessary to its judgment. A review of the County Manager's decision would not have included a review of Petitioner's claims of violation of civil rights because those issues would not have been properly before the Eleventh Judicial Circuit Appellate Division.[1] In fact, the County Manager's decision is nothing more than a rubber stamp, a standard, institutionalized letter. See App. 56-57, Petition for Writ of Certiorari. If the County Manager and the Eleventh Judicial Circuit Appellate Division had read the entire file, they would have realized that there was a gross miscarriage of justice: a violation of Dade County Ordinance 2-47 (See App. 17 and 29, Petition for Writ of Certiorari), thus rendering the entire process infirm thus causing the Eleventh Judicial Circuit Appellate Division to lack subject matter jurisdiction. The Eleventh Judicial Circuit Appellate Division is duty-

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[1]Of course, we will never know the scope of the Eleventh Judicial Circuit Appellate Division review since their decision was rendered as a P.C.A., per curiam affirmed, without an opinion.

bound to uphold and enforce Dade County Ordinance 2-47 and a review of the file would have revealed its violation by Respondents. See App. 64, Petition for Writ of Certiorari; Narcisse v. Dade County, 20 Fla. Supp.2d 131 (Fla. 11th Jud. Cir. App. Div. 1986)("Jurisdiction of this Court to hear this appeal is based on Rule 9.030(c)(1)(C) of the Florida Rules of Appellate Procedure and Dade County Code § 2-47.1.").

Daugherty v. Sarasota County, Florida, 157 F.R.D. 542 (M.D. Fla. 1994), addresses the issue of res judicata as applied to the review of an administrative agency decision. In that case, the Plaintiff filed a complaint for violation of civil rights under § 1983 for deprivation of property without just compensation. Plaintiff wanted to use certain real property as a commercial borrow pit and had submitted permit applications to the Defendant several times, each time being denied permission. The Plaintiff eventually turned to the courts for judicial review of the denial of permit applications by writ of certiorari. The court denied the writ of certiorari without an opinion, after which the Plaintiff filed the suit for violation of his civil rights. Defendant sought summary judgment on grounds that res judicata barred the

action. The trial court held that the denial of the writ of certiorari, without an opinion, did not constitute res judicata. The trial court found that none of the issues in the case before it could have been properly brought in a petition for writ of certiorari since the review would have been limited to the record of the commission hearings of the permit requests. Similarly, in this case, res judicata should not attach because Petitioner could not have properly brought violation of his civil rights in a petition for writ of certiorari. As the Florida Supreme Court pointed out in Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995), the appellate court is not entitled to reweigh the evidence or substitute its judgment for that of the agency. The court only looks to see if procedural due process was afforded and whether the correct law was applied. The Eleventh Judicial Circuit Appellate Division could only review the County Manager's decision, which was not even properly before it due to procedural violations occurring prior to the County Manager's review. And, again, there is no way of knowing whether or not the correct law was applied since there is no written opinion.

As a basis for its decision, the Daugherty court cited to Keay

v. City of Coral Gables, 236 So.2d 133 (Fla. 3d DCA 1970), which also held that a denial of petition for writ of certiorari cannot be construed as passing upon any of the issues in the litigation. While Daugherty and Keay are denials of petitions for writ of certiorari, and the court action which is the basis of this appeal is a per curiam affirmance, all have one thing in common: there was no written opinion. There is no way that anyone can determine what the decisions in Daugherty and Keay were based upon, nor what the Eleventh Judicial Circuit Appellate Division reviewed in this case. For this reason, res judicata should not apply where there is no written opinion affirming an administrative agency decision.

Addressing Respondent's second point, that this Court has already resolved the issue regarding the preclusive effect of state court affirmance of an administrative decision, this Court has not affirmatively resolved this issue. No where has the Court addressed the issue of res judicata as applied to a non-binding arbitration brought under a Collective Bargaining Agreement where the hearing examiner lacked subject matter jurisdiction and the subsequent review by a state court (of an action taken under a Collective Bargaining Agreement) did

not address the issues presented in federal court (Title VII). Nor is there any law regarding the effect given to a decision rendered without a written opinion.

Finally, Respondents argue that decisions rendered by administrative agencies, which would be given preclusive effect in state court, should be given preclusive effect in federal court. Petitioner does not argue this point except to point out that the state court (Eleventh Judicial Circuit, Dade County, Florida) has not given preclusive effect to the administrative agency decision which is the basis of this appeal nor could it for the following controlling case law: Keay v. City of Coral Gables, 236 So.2d 133 (Fla. 3d DCA 1970); Don Mott Agency, Inc. v. Harrison, 362 So.2d 56 (Fla. 2d DCA 1978); Accent Realty of Jacksonville v. Crudele, 496 So.2d 158 (Fla. 3d DCA 1986); Collier v. City of Homestead, 81 So.2d 201 (Fla. 1955); FIGA v. Celotex Corp., 547 So.2d 696 (Fla. 4th DCA 1989); and Tucker v. Resha, 610 So.2d 460 (Fla. 1st DCA 1992).

One final point: cases cited by the Respondent are cases not involving Title VII issues. However, Petitioner's cases address Title VII issues, as does his own case presently before this Court also entail

Title VII issues.

CONCLUSION

For the reasons stated in the foregoing Reply to Respondents' Brief in Opposition and in the Petition for Writ of Certiorari, this Court should accept jurisdiction, granting certiorari, and reversing the trial court's decision and remanding this case for trial.

Respectfully submitted,

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